United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original - Affidavit of Mailing

74-2198

To be argued by
DAVID A. DE PETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2198

AMERICO MICHEL,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Americo Michel appeals from an order of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*) entered July 29, 1974, which order denied appellant's motion to vacate the sentence and withdraw his plea of guilty.

On this appeal, appellant asserts that the Court below committed error in (1) failing to hold an evidentiary hearing on the issue of whether he understood the meaning of the special parole term to which he was sentenced pursuant to Title 21, United States Code, Section 841(b)(1)(A), and (2) holding that deportation is a collateral consequence of a plea of guilty of which a defendant need not be informed prior to the Court's acceptance of a guilty plea.

Statement of the Case

On February 20, 1973, appellant pleaded guilty to one count of a multi-count indictment, admitting the distribution of cocaine (Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2).* Two additional counts in which appellant was also named were dismissed on June 1, 1973 when he was sentenced to 5 years imprisonment and 5 years special parole (Transcript of Sentencing, Appellant's Appendix at 39).

Nearly 11 months later, on April 23, 1974, appellant filed a motion pursuant to Title 28, United States Code, Section 2255 through which he sought to vacate his sentence and withdraw his plea of guilty. Appellant contended that his plea was not voluntary under Rule 11 of the Federal Rules of Criminal Procedure because he was not fully informed of the consequences of his plea. Specifically, he asserted (1) that he was not informed that as a resident alien he might, pursuant to Title 8, United States Code, Section 1251(a)(11) and (b), be subject to deportation subsequent to his conviction, and (2) that he did not understand the meaning of the special parole term imposed under Title 21, United States Code, Section 841(b)(1)(A) (Appellant's Appendix at 53).

Appellant's motion was denied on both grounds by the District Court in an unreported opinion dated July 25, 1974. Chief Judge Mishler specifically held: (1) that deportation is a collateral rather than direct consequence of a plea of guilty, and therefore, appellant need not have been so informed to render his plea of guilty voluntary, and (2) that appellant was adequately informed by the Court that he would be subject to a special parole term in addition to any regular sentence he might receive (Appellant's Appendix at 12).

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* Appellant's plea of guilty was taken after the commencement of trial along with the pleas of three of his four co-defendants (see Transcript of Plea, Appellant's Appendix at 14).

POINT I

The District Court properly held that appellant understood the meaning of the special parole term without holding an evidentiary hearing.

Appellant pleaded guilty to a charge of distribution of cocaine. Under Title 21, United States Code, Section 841(b)(1)(A), the maximum sentence includes "a special parole term of at least 3 years," and appellant was duly notified of this requirement by the Court at the time he indicated his desire to plead guilty. The Court specifically inquired if appellant understood that a special parole term would be part of his sentence, and appellant responded affirmatively (Appellant's Appendix at 33). Nevertheless, appellant asserted in his motion papers that he "did not understand the meaning of the special parole term attached to his sentence" (Appellant's Appendix at 54).

In considering appellant's motion, the Court below specifically held that special parole is a direct consequence of the guilty plea and is, therefore, within the mandate of Rule 11 of the Federal Rules of Criminal Procedure. The Government agrees that special parole is a consequence of a plea of guilty. It is submitted, however, that the District Court was justified in finding appellant to have understood this consequence of his plea without the holding of an evidentiary hearing.

Title 28, United States Code, Section 2255 requires a hearing to be held "(u)nless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief. . . " In *United States* v. *Miranda*, 437 F.2d 1255 (2d Cir. 1971), *cert. denied*, 409 U.S. 874 (1972), this Court considered when a hearing would be required on a motion brought under Section 2255. The basis for the motion in *Miranda* involved an assertion by the petitioner that he was mentally incompe-

tent at the time he pleaded guilty to a narcotics violation. Judge Smith, after reviewing the authorities, concluded:

> The general consensus of the Courts which have considered the issue, therefore, seems to be where no evidentiary facts are alleged to support a bald allegation of mental incompetence, a hearing may not be required. . . On the other hand, where the movant has raised detailed and controverted issues of fact, a hearing will be required. 437 F.2d at 1258 (emphasis supplied).

Accord *O'Neil* v. *United States*, 486 F.2d 1034 (2d Cir. 1973).

This standard was affirmed by the Supreme Court in *Fontaine* v. *United States*, 411 U.S. 213, 214 (1973) (*per curiam*), where the Court required that a hearing be held when a "(p)etitioner's motion for relief under Section 2255 sets out detailed factual allegations. . . ." See also *United States* v. *Malcolm*, 432 F.2d 809, 812 (2d Cir. 1970) (hearing not required "where the allegations are insufficient in law, undisputed, immaterial, vague, conclusory, palpably false or patently frivolous"); *Torres* v. *United States*, 370 F. Supp. 1348, 1349-1350 (E.D.N.Y. 1974).

More recently, in the case of *Williams* v. *United States*, — F.2d — (2d Cir. Slip Opinion 5543, 5549; decided September 25, 1974), this Court observed:

> ". . . the District Court has discretion before granting an evidentiary hearing to ascertain whether the claim is substantial. Where allegations in the petition are immaterial, conclusory and palpably false, there is no basis for a hearing" (citations omitted).

In the instant case, appellant's motion papers contain a simple allegation that he "did not understand the meaning of the special parole term," and that the meaning was

not explained to him (Appellant's Appendix at 54). What appellant characterizes as the "sufficient affidavit of his counsel of record in the trial court" (Appellant's Brief at 7) only supports that portion of appellant's motion which asserts that the meaning of the phrase "special parole" was not discussed with him by his attorney (Appellant's Appendix at 56). The record in the instant case clearly indicates, however, that the Court informed appellant both of the maximum sentence and the existence of a mandatory special parole term and that appellant responded affirmatively when asked if he understood that the Court would impose a special parole term (Appellant's Appendix at 32-33). Thus the "motion and the files and records" of the instant case "conclusively show that the prisoner is entitled to no relief." Title 28, United States Code, Section 2255. Clearly, there are no "detailed and controverted issues of fact" in the instant case sufficient to require that an evidentiary hearing be held. *United States* v. *Miranda, supra* at 1258.

In addition, the minutes of the plea and sentencing do not "confirm petitioner's confusion" (Appellant's Brief at 10); rather they serve to clearly establish that the Court did take particular care to ascertain appellant's full understanding of the consequences of his plea. It is for this reason that the instant case is distinguishable on its facts from *United States* v. *Richardson,* 483 F.2d 516 (8th Cir. 1973), upon which appellant relies. In *Richardson,* the defendant was only informed of the existence of a special parole term by an Assistant United States Attorney's reading of the possible maximum sentence. The court never specifically inquired as to whether or not the defendant understood either the maximum term or the special parole term. 483 F.2d at 520. The Court of Appeals in *Richardson,* stated that "(h)ad the record shown that Richardson had been adequately advised of the consequences of his plea by a reliable source and that he understood these consequences before entering his plea of

guilty in open Court, we would find the necessary compliance with Rule 11". 483 F.2d at 519. In short, the record in the instant case does show appellant to have been adequately advised by the Court.

POINT II

The District Court properly held that deportation is a collateral rather than a direct consequence of a plea of guilty, and that a defendant need not be informed of the possibility he will be deported to render his plea voluntary.

Rule 11 of the Federal Rules of Criminal Procedure was amended in 1966 to provide, *inter alia*, that the Court must ascertain the defendant's understanding of the consequences of the plea before accepting his plea of guilty. Courts had often, however, even prior to this addition, considered what "consequences of the plea" had to be stated to a defendant. The law clearly was that courts need "not instruct an accused on all possible legal disadvantage and collateral consequences of his conviction on the charges in an indictment." *United States* v. *Washington,* 341 F.2d 277, 286 (3d Cir. 1965), *cert. denied, sub nom, DeGregory* v. *United States,* 382 U.S. 850 (1967).

Courts dealing with this issue after 1966 have not seen fit to expand the definition of consequences to include indirect effects of a plea of guilty. For example, in *Bye* v. *United States,* 435 F.2d 177, 179 (1970), this Court indicated that "an accused need not be informed prior to the acceptance of his guilty plea about every conceivable collateral effect the conviction entered on the plea might have." As one of several examples of the type of "collateral consequences" not considered to be within the scope of Rule 11, the Court cited *United States* v. *Parrino,* 212 F.2d 919, 922 (2d Cir. 1954), which held specifically that deportation

was a collateral consequence of a plea of guilty. See also *United States* v. *Sambro*, 454 F.2d 918 (D.C. Cir. 1971); *Joseph* v. *Esperdy*, 267 F. Supp. 492, 494 (S.D.N.Y. 1966).

The Fourth Circuit has articulated the basis for the distinction made between "direct" and "collateral" consequences of a plea, stating that it "turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment . . . (t)he fact that the Court fails to advise the defendant that his plea, if accepted, makes him subject to deportation proceedings . . . is deemed a collateral consequence and will not render the plea involuntary." *Cutherell* v. *Director, Patuxent Institute*, 475 F.2d 1364, 1366 (4th Cir. 1973).*

Appellant's reliance upon *United States* v. *Santelises*, 476 F.2d 787, 789 (2d Cir. 1973), is misplaced. That case held that the failure of a trial judge to warn a defendant of the possibility he would be deported after pleading guilty did not constitute a violation of due process. In *Santelises*, the plea of guilty was made prior to the effective date of the 1966 Amendments to Rule 11, and, while the Court specifically reserved judgment on similar questions arising after July 1, 1966, it seems specious to read into that reservation, as appellant apparently does, an intention on the part of the Court to impose upon trial judges the requirement that

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* "Results" of a guilty plea such as loss of "good time credit" previously earned (*Hutchinson* v. *United States*, 450 F.2d 930, 931 (10th Cir. 1971)), the possibility of an undesirable discharge from the Air Force (*Redwine* v. *Zuckert*, 317 F.2d 336, 338 (D.C. Cir. 1973)), the loss of the right to vote in some states (*United States* v. *Cariola*, 323 F.2d 180 (3d Cir. 1963)), the possibility of consecutive rather than concurrent sentences (*United States* v. *Vermeulen*, 436 F.2d 72, 75 (2d Cir. 1970)), and the institution of separate civil proceedings for commission to an institution for treatment (*Cutherell* v. *Director, Patuxent Institute, supra* at 1366) have all been held to be indirect consequences of a plea of guilty.

they inform a defendant about the possibility he will be deported. The long-standing definition of deportation as a collateral consequence of a guilty plea about which the defendant need not be informed under Rule 11 was based on sound judicial reasoning and has never been renounced in this or any other Circuit.

The Government does not dispute appellant's contention that deportation can, in some cases, operate as a severe sanction. His claim, however, is based on the theory that deportation will *automatically* result from an alien's plea of guilty to a narcotics violation, and this is simply not the case. A conviction entered upon an alien's plea of guilty does not subject him to immediate deportation; it merely places him into the class of "deportable" aliens defined by Title 8, United States Code, Section 1251(a)(11). Proceedings must then be instituted by order of the Attorney General and a hearing must be held. Title 8, United States Code, Section 1252(b); 1 Gordon and Rosenfield, Immigration Law and Procedure, Sections 5.8, 5.9. The respondent in such an action has a right to appeal the decision of the "special inquiry officer" to the Board of Immigration Appeals. 1 Gordon and Rosenfield, Sections 1.10, 5.13c. Upon exhausting his administrative remedies, the alien seeking to avoid deportation also has a right to bring an action in the appropriate Federal District Court, naming the Immigration and Naturalization Service as respondent, to seek review of a decision ordering his deportation. Title 8, United States Code, Section 1105a; 2 Gordon and Rosenfield, Section 8.1 et seq.*

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* The Government would note the following as taken from page two of appellant's motion of September 27, 1974 seeking to expedite this appeal:

> "On June 12, 1974, an Immigration and Naturalization Service Hearing of the issue of petitioner's deportation as an alien convicted of a narcotics offense pursuant to 8 U.S.C. § 1251(a)(11) was postponed on request of counsel

[Footnote continued on following page]

In addition, most aliens subject to deportation can apply to the Attorney General for "suspension of deportation" under Title 8, United States Code, Section 1254. While this type of relief was forbidden to narcotics violators until 1952, they are now specifically included within the scope of the statute. See Title, 8, United States Code, Section 1254(a)(2); 2 Gordon and Rosenfield, Section 7.9.

Appellant has argued that the inapplicability of Title 8, United States Code, Section 1251(b) (concerning the granting of pardons and recommendations of the sentencing judge) to aliens convicted of narcotics violations renders deportation of those aliens "automatic." This is not, however, the case. The provisions of Section 1251(b) are applicable only to persons convicted of crimes of "moral turpitude" (Title 8, United States Code, Section 1251(a)(4)), and even for those individuals the granting of the pardons, or the recommendation not to deport, remains totally discretionary. Only one out of the seventeen specified classes of "deportable" aliens listed in the statute can avail themselves of the provisions of the Section, and even for those individuals no "right" has been created.

The deportation of an alien convicted of a narcotics violation, therefore, is not an automatic result of convic-

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over the objection of the Service Trial Attorney, pending disposition on petitioner's motion. Another hearing will be scheduled in the immediate future on the issue of deportation. Vacation of petition's sentence will make such a hearing unnecessary."

It would appear that if Judge Mishler's observation in his opinion (Appellant's Appendix at 8) that appellant's situation "present[s] a persuasive argument for nonpriority status" were accepted, appellant's entire argument in Point II of his brief would be moot. As such, it seems as if appellant has failed to exhaust his administrative remedies, and, moreover, by postponing the deportation hearing, has simply preserved a further issue for this Court's determination.

tion.* Deportation takes place only after the institution of a separate, administrative, civil proceeding and the possibility that civil or administrative action will result from a conviction has been held a collateral rather than a direct consequence of a plea of guilty. *Cutherell* v. *Director, Patuxent Institute, supra* at 1366; *Hutchinson* v. *United States, supra* at 931. Petitioner's plea of guilty was not, therefore, rendered involuntary under Rule 11 by the trial court's failure to warn him of the "possibility" that he would be deported.

CONCLUSION

The order should be affirmed.

Respectfully submitted,

Dated: October 25, 1974

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* In addition, application can be made to the District Director of the Immigration and Naturalization Service by the alien for a "nonpriority status" of deportability because of humanitarian factors. If the District Director's recommendation of nonpriority is approved, the alien's deportation is suspended indefinitely (Appellant's Appendix at 62).

** The United States Attorney's Office wishes to acknowledge the assistance of Lois Wasoff in the preparation of this brief. Ms. Wasoff is a third year student at New York University Law School.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 25th day of October 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Michael J. Churgin, Esq.
127 Wall Street
New Haven, Conn. 06520

Sworn to before me this
25th day of Oct. 1974

IRENE B. COHEN
Notary Public, State of New York
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Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN